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New Trial in Tainted Conviction

PROSECUTOR WITHHELD knowledge that alleged victim recanted key testimony in child molestation case

GREG LAND | gland@alm.com

A NEW TRIAL has been ordered for a man convicted of aggravated child molestation after his defense attorneys told the judge they'd overheard the prosecutor confide to a juror after the trial that the victim had recanted his testimony on one of the two alleged incidents.

Instead of informing opposing counsel, said defense attorney Barry Hazen, the assistant district attorney allowed the trial to proceed on the two-count indictment without disclosing that one of the counts was based on testimony the state knew had been retracted.

Hazen said he and co-counsel Michael Jacobs were in the jury room after the trial when they heard a juror ask Fulton County Assistant District Attorney Demone Lee why he had not questioned the defendant, Jon Thieme, about the victim's assertion that he had been anally sodomized.

"He said he didn't push the anal sodomy [count] because the kid said it didn't happen," said Hazen.

Lee told the juror he had left the charge in "because he wanted to see what the jury would do with it," said Hazen.

In March, Thieme was convicted on one count and sentenced to 25 years

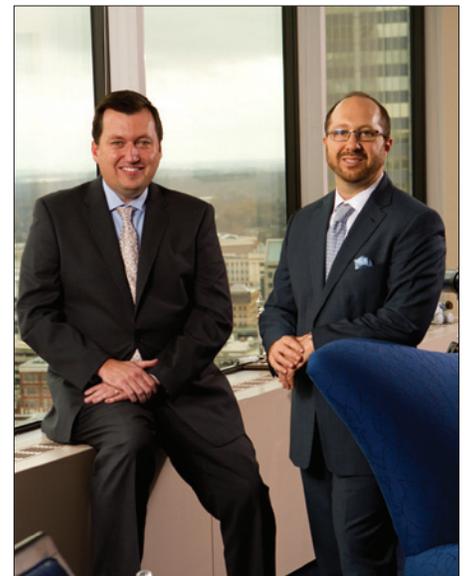
in prison by Fulton County Superior Court Judge Alford Dempsey.

On Tuesday, Dempsey entered a consent order granting Thieme a new trial, agreeing with his attorneys that the prosecution's failure to inform the defense about the recantation violated Thieme's rights under the U.S. Supreme Court's 1970 decision in *Brady v. Maryland*, under which the state has a duty to turn over exculpatory evidence to a criminal defendant.

Fulton County Senior Assistant District Attorney Lenny Krick signed the order, and DA Paul Howard offered no excuses on Wednesday.

"Providing Brady material is both a legal and moral obligation resting upon every prosecutor," Howard said in an emailed statement. "When the line of demarcation is close or somewhat unclear, we believe the better practice is to make the disclosure. Such was not done in this case. Accordingly, as communicated through the consent order, we believe honesty requires that this matter is retried."

According to the State Bar of Georgia website, Lee is a graduate of the University of Florida's Levin College of Law and joined the bar in 2011. The Daily Report was not able to reach Lee for comment.



JOHN DISNEY/DAILY REPORT

Michael Jacobs, left, overheard conversation that supported **Lawrence Zimmerman's** new trial bid.

Asked about the matter, State Bar of Georgia General Counsel Paula Frederick pointed to Bar Rule 3.8, "Special Responsibilities of a Prosecutor," as being potentially relevant to Lee's handling of the case. Section d says that a prosecutor must "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense."

The maximum penalty for violating Rule 3.8 is a public reprimand.

Frederick could not comment further, she said via email, “as the situation could result in a disciplinary grievance being filed.”

Criminal defense attorney Lawrence Zimmerman, who drafted Thieme’s motion for new trial and the order Dempsey signed, said he was pleasantly surprised that the DA had consented to it.

But, he said, if Hazen and Jacobs had not happened to overhear the conversation between the prosecutor and juror, “this kid would be rotting in prison every day for the next 25 years.”

Thieme, 23, was indicted and tried on two counts of aggravated child molestation: Count one was based on the victim’s allegations that Thieme placed his penis in the boy’s mouth, and count two on an allegation that he had anally sodomized the child.

On March 22, the jury convicted Thieme on the first count but acquitted on the second, and Dempsey immediately sentenced him to 25 years.

Hazen said the lawyers and jurors were talking afterward when they overheard Lee’s comments.

Hazen said both he and Jacobs heard Lee’s statement and left the jury room to confer.

“We didn’t say anything then, because we didn’t want it to get buried,” said Hazen. “We didn’t want to give them any advance warning.”

During a May conference with Dempsey and Lee that was supposed to concern a bail motion for Thieme pending his motion for new trial, the defense lawyers instead asked the prosecutor about what they’d heard.

“We confronted him with it in front of the judge, and he said yes, in fact, he had been told this child recanted,” said Hazen.

Hazen said he asked Lee when he first found out the child had said the incident had never occurred.

“He said he wasn’t sure, maybe a month or so before trial,” Hazen said.

Dempsey told Lee to check his files to find out when he learned of the recantation, and the next day Lee sent Hazen an email saying he was “still trying to nail down the exact date. After speaking with [the victim’s] mom, I can say that it was about a week before trial.”

During that week, the order said, Hazen and Lee exchanged email and phone messages, and Lee came to Hazen’s office the Friday before trial to review a witness video.

“At no point in time during any of those meetings, or communications, did Mr. Lee inform Mr. Hazen that the victim recanted or changed part of his story regarding these serious allegations,” it said.

According to the order, during recorded interviews played at trial the victim “described in minute detail” being anally molested by another relative, then—when asked what Thieme had done—said it was the same thing. In another recording, he said Thieme tried to anally rape him but was unable to do so.

“Therefore,” said the order, “the State presented audio-recorded evidence to the jury that [Thieme] had committed anal sexual molestation when they were previously apprised that the victim had recanted this allegation.”

The prosecutor also put up as an expert witness a forensic psychologist with the DA’s office who testified that young male victims of anal sodomy were often reluctant to come forward “due to the fact that they may be looked upon as ‘gay,’” said the order. “Thus, this testimony supported the victim’s claim of anal molestation. If this recantation had been revealed, the defense would have been able to conduct a much more sifting cross-examination of [the psychologist] regarding this opinion.”

“Based on the above,” it said, “there is a reasonable probability that the

outcome of the proceeding would have been different if the defense was provided this key exculpatory information.”

Hazen said that he and Jacobs noticed that Lee avoided direct discussion of the anal sodomy charge at trial, and did not bring it up when the child’s mother testified.

“It wasn’t up to us to say, ‘Hey, aren’t you forgetting something?’” he said. “In retrospect, it showed a conscious knowledge that they knew the victim had recanted.”

The victim’s mother never allowed the defense lawyers to interview him, Hazen said, and she only spoke to Hazen briefly a year or so before trial “to be polite,” he said, then made it clear she would not do so again.

Zimmerman, who was not involved in the case when it went to trial, came aboard pro bono to handle the motion for new trial since Hazen and Jacobs were the witnesses upon whose testimony the motion was based.

“I wrote the motion and order,” Zimmerman said. “I’m surprised Paul Howard’s office signed it; it’s pretty strong.”

The next step, he said, is to have Thieme returned to the Fulton County Jail from the Georgia Department of Corrections diagnostic center in Jackson “since he’s no longer a convicted felon.”

Thieme has a bond hearing set for Dec. 19, he said, and had been free on a signature bond pending his first trial.

No new trial date has been set, said Zimmerman.

“We’re hoping to forego that,” he said. “We’re hoping the district attorney will see the light, and dismiss these charges.”

The case is *State v. Thieme*, No. 11SC99152. 